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8-7-401. Title.

This subchapter may be known and may be cited as the "Emergency Response Fund Act."

8-7-402. Legislative intent.

It is the intent of the General Assembly:

- (1) To provide the state with the authority necessary to protect the public's health and safety and the environment from releases or threatened releases of hazardous substances;
- (2) To provide emergency response capabilities necessary to promptly contain, control, or remove hazardous substances resulting from spills or accidental releases.

8-7-403. Definitions.

- (a) As used in this subchapter, unless the context otherwise requires:
 - (1) "Department" means the Department of Pollution Control and Ecology;
 - (2) "Commission" means the Arkansas Pollution Control and Ecology Commission;
 - (3) "Director" means the Director of the Department of Pollution Control and Ecology;
 - (4) "Federal act" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510;
 - (5) "Fund" means the Emergency Response Fund created by this subchapter;
 - (6) "Person" means any individual, corporation, company, firm, partnership, association, trust, joint-stock company or trust, venture, state or federal government or agency, or any other legal entity, however organized;
 - (7) "Releases of hazardous substances" means any spilling, leaking, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of hazardous substances into the environment;
 - (8) "Hazardous substance" means:
 - (A) As of March 20, 1985, any substance designated pursuant to 311(b)(2)(A) of the Federal Water Pollution Control Act (Public Law 92-500); any element, compound mixture, solution, or substance designated pursuant to 102 of Title 1 of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Public Law 96-510); any hazardous waste, including polychlorinated biphenyls (PCB's), as defined by the Arkansas Hazardous Waste Management Act, as amended, 8-7-201 et seq., and the regulations promulgated thereunder; any toxic pollutant listed under 307(a) of the Federal Water Pollution Control Act (Public Law 92-500); any hazardous air pollutant listed under 112 of the federal Clean Air Act (Public Law 95-95); and any hazardous chemical substance or mixture regulated under 7 of the federal Toxic Substances Control Act (Public Law 94-469); and

(B) Any other substance or pollutant designated by regulations of the commission promulgated under this subchapter.

(9) "Treatment," "storage," "disposal," "generation," and "hazardous waste" shall have the meanings provided in 3 of the Arkansas Hazardous Waste Management Act, as amended, and the regulations promulgated pursuant to that subchapter;

(10) "Response action" means action necessary to effect permanent control, prevention, treatment, or containment of releases and threatened releases including the removal of hazardous substances from the environment where such removal is necessary to protect public health or safety.

These actions are intended to include investigations designed to determine the need for and scope of remedial action and such planning, legal, fiscal, economic, engineering, geological, technical, or architectural studies as necessary to plan and direct remedial actions, to recover the cost thereof, and to enforce the provisions of this subchapter;

(11) "Threatened release" means any situation where a sudden release of hazardous substances can be reasonably expected unless prevented by change of operation or installation or construction of containment or treatment devices or by removal or other response action;

(12) "Local government" means any city of the first class, any city of the second class, or any incorporated town or any county government of the State of Arkansas.

(b) (1) As used in 8-7-413 - 8-7-415, unless the context otherwise requires, "responsible party" means:

(A) The owner or operator of a facility or site at which hazardous substances have been disposed and from which releases or threatened releases of hazardous substances occur;

(B) Any person who, at the time of disposal of a hazardous substance, owned or operated a facility or site from which releases or threatened releases of hazardous substances occur;

(C) Any generator of hazardous substances who causes a release or threatened release of hazardous substances or who, at the time of disposal, caused the substance to be disposed of at a facility or site from which releases or threatened releases of hazardous substances occur;
or

(D) Any transporter of hazardous substances who causes a release or threatened release of such hazardous substances or who, at the time of disposal, selected the facility or site of disposal from which releases or threatened releases of the substances occur.

(2) Responsible party does not include:

(A) A person who merely provides financing or loans to a responsible party;

(B) A person who obtains title to property through foreclosure or through the conveyance of property in total or partial satisfaction of a mortgage or other security interest in property.

8-7-404. Penalties.

- (a) (1) Any person who commits any unlawful act under this subchapter shall be guilty of a misdemeanor and upon conviction shall be subject to imprisonment for not more than one (1) year or to a fine of not more than ten thousand dollars (\$10,000), or to both a fine and imprisonment.
- (2) Each day or part of a day during which the violation is continued or repeated shall constitute a separate offense.
- (b) Any person who violates any provision of this subchapter or commits any unlawful act under this subchapter shall be subject to a civil penalty in such amount as the director shall find appropriate, not to exceed twenty-five thousand dollars (\$25,000) per day of the violation, subject to the payment of any expenses reasonably incurred by the state in removing, correcting, or terminating any adverse effects resulting therefrom, including the cost of the investigation, inspection, or survey establishing such violation or Unlawful act, subject to the payment to the state of reasonable compensation of any actual damage resulting therefrom.

8-7-405. Unlawful acts.

It shall be unlawful for any person:

- (1) To violate any provision of this subchapter or any rule or regulation adopted under this subchapter;
- (2) To knowingly make a false statement, representation, or certification in any report or other document filed or required by this subchapter or the rules and regulations adopted pursuant thereto;
- (3) To violate any order issued by the department under this subchapter or any provision of such orders;
- (4) To fail to implement response actions in accordance with representations made by persons liable for a release or threatened release to the department as to their willingness and ability to appropriately respond to the release or threatened release for the purposes of 8-7-408(c).

8-7-406. Regulations - Administrative procedure.

The commission shall adopt regulations under this subchapter necessary to implement or effectuate the purposes and intent of this subchapter including, but not limited, to regulations affording any persons aggrieved by any order issued pursuant to this subchapter an opportunity for a hearing thereon, and commission review of the action.

8-7-407. Compliance of federal and state entities.

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the federal government and the state government shall be subject to, and comply with, this part in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under 8-7-413 - 8-7-416 and 8-7-418.

8-7-408. Response authority of director generally.

- (a) The director is authorized to initiate and implement response actions under this subchapter whenever there is a release or a threatened release of hazardous substances which may present an imminent and substantial endangerment to the public health, safety, or welfare or to the environment.

- (b) Whenever the director has reason to believe that a release or threatened release of hazardous substances may present an imminent and substantial endangerment to the public health, safety, or welfare or to the environment, the director and the employees and the authorized representatives of the department shall have the right to enter upon any affected private or public property for the purpose of collecting information and for initiating and implementing appropriate response actions.
- (c) Response actions are not authorized when the director has reasonable assurance that the person responsible for a release or threatened release has committed to and is capable of initiating corrective and remedial action in a timely manner and that the actions will achieve results equivalent to the results from response action authorized in this section.
- (d) The department or any contractor of the department under this section, in taking response action pursuant to this subchapter, shall not be required to obtain any state or local permit for the portion of any response or remedial action conducted pursuant to this subchapter entirely on site, where the remedial action is otherwise carried out in compliance with the regulations of the department.

8-7-409. Orders of director.

- (a) Upon finding that a release or a threatened release of hazardous substances may present an imminent and substantial endangerment to the public health, safety, or welfare or to the environment the director may, without notice or hearing, issue an order reciting the existence of such an imminent hazard and substantial endangerment and requiring that such action be taken as he determines necessary to protect the health and safety of any affected or threatened persons or the environment and to otherwise meet the emergency.
- (b) The order of the director may include, but is not limited to, requiring any person responsible in whole or in part for the release or threatened release, or any person in total or partial control of the site, facility, or transport vehicle from which the release or threatened release emanates if that person has caused or contributed to the release or threatened release, to take such steps as are necessary to protect the public health and safety and the environment.
- (c) A person shall not be deemed responsible for or to have caused or contributed to the release or threatened release of hazardous substances if such person merely provides financing or loans to another person or obtains title to property through foreclosure or through conveyance of property in total or partial satisfaction of a mortgage or other security interest in property.
- (d) The orders may be issued verbally or in writing. If originally issued verbally, a written order will be issued by the director confirming the verbal order as soon as reasonably possible to do so.
- (e) Any person to whom the order is directed shall comply therewith immediately but, upon written application to the director, shall be afforded a hearing and administrative review of the order within ten (10) days of making the application.

8-7-410. Emergency Response Fund.

- (a) There is created the Emergency Response Fund.

- (b) (1) There is authorized to be deposited in the Emergency Response Fund all moneys recovered pursuant to § 8-7-417, any moneys received by the state as a gift or donation to the fund, all interest earned upon moneys deposited in the fund, and all moneys received as penalties pursuant to the Arkansas Water and Air Pollution Control Act, § 8-4-101 et seq., the Arkansas Hazardous Waste Management Act, as amended, § 8-7-201 et seq., the Solid Waste Act, as amended, § 8-6-201 et seq., and the Lead-Based Paint-Hazard Act, § 8-4-401 et seq.
- (2) However, in the event the total amount in the Emergency Response Fund equals or exceeds one hundred fifty thousand dollars (\$150,000), any additional moneys collected pursuant to this section shall be deposited in the Hazardous Substance Remedial Action Trust Fund.
- (c) The Emergency Response Fund as created by this section shall be administered by the director, who shall authorize expenditures from the fund for the following purposes:
 - (1) The purchase of any commodities or services necessary in taking response actions in connection with a release or a threatened release of hazardous substances;
 - (2) For reimbursement of all costs incurred by the department in taking response actions in connection with a release or a threatened release of hazardous substances.

8-7-411. Limitations upon expenditures.

- (a) An expenditure authorized under this subchapter shall be limited to those situations where spill control and countermeasures plans or contingency plans which are required by state or federal statutes or regulations do not apply or where the resources obligated under the plans prove insufficient to contain, control, or remove hazardous substances to the extent required to protect the public's health and safety.
- (b) The director is not authorized to expend in excess of sixty thousand dollars (\$60,000) on any single response action without commission approval.

8-7-412. Furnishing of information.

- (a) (1) For the purpose of assisting in determining the need for response actions in connection with a release or threat of release of hazardous substances under this subchapter or for enforcing the provisions of this subchapter, any person who stores, treats, or disposes of hazardous substances, or if necessary to ascertain facts not available at the site or facility where such hazardous substances are stored, treated, or disposed of; any person who generates, transports, or otherwise handles or has handled hazardous substances shall, upon request of any officer or employee of the department, furnish information relating to the substance and permit that person at all reasonable times to have access to, and to copy all records relating to the substances and to inspect and obtain samples of any the substances or other materials.
- (2) However, any information which would constitute a trade secret under the Arkansas Trade Secrets Act, 4-75-601 et seq., obtained by the department or its employees in the administration of this subchapter, except emission data, shall be kept confidential.
- (b) Any violation of this section shall be unlawful and constitute a misdemeanor.

8-7-413. Liability of responsible parties.

- (a) Responsible parties shall be liable to the state for all costs and expenditures of response actions incurred by the state and shall be liable to local governments for all costs and expenditures of response actions incurred by local governments.
- (b)
 - (1) No person shall be liable under this section for damages as a result of actions taken or committed at the direction of the department in the course of rendering care, assistance, or advice with respect to an incident creating a danger to public health or welfare or the environment as a result of any release of a hazardous substance or the threat thereof.
 - (2) This subsection shall not preclude liability for damages as the result of gross negligence or intentional misconduct on the part of the person. For the purposes of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

8-7-414. Apportionment of costs and expenditures.

- (a)
 - (1) Any party found liable for any costs or expenditures recovered under 8-7-413, 8-7-415, 8-7-416, and 8-7-418 which establishes by a preponderance of the evidence that only a portion of such costs or expenditures are attributable to his or her actions shall be required to pay only for that portion.
 - (2) If the trier of facts finds the evidence insufficient to establish each party's portion of costs or expenditures, the court shall apportion the costs or expenditures, to the extent practicable, according to equitable principles, among the responsible parties.
- (b)
 - (1) In any action under this section, no responsible party shall be liable for more than that party's apportioned share of the amount expended for such response action.
 - (2) The apportioned share shall be based on a responsible party's portion of the total volume of the hazardous substance at the site in question at the time of action taken under this subchapter.
 - (3) Any expenditures required by the provisions of this subchapter made by a responsible party, before or after suit, shall be credited toward any apportioned share.

8-7-415. Recovery of expenditures generally.

- (a) Making use of any and all appropriate existing state legal remedies, the Department of Pollution Control and Ecology or the Attorney General shall act to recover the amount expended by the state for any and all response actions from any and all identified responsible parties for each facility or site.
- (b) All moneys recovered from responsible parties for expenditures from the fund shall be deposited in the Emergency Response Fund.

8-7-416. Recovery of expenditures - Limitations.

- (a) No person, including the state, may recover under the authority of this section, 8-7-413 - 8-7-415 and 8-7-418 for any response costs or damages resulting from the application in accordance with label directions of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act.

- (b) No person, including the state, may recover under the authority of this section for any response costs or damages resulting solely from an act or omission of a third party or from an act of God or an act of war.

8-7-417. Liens for expenditures and value of improvements.

- (a) In the case that the owner of real property that is the location of a release or threatened release upon which response activities are performed under this subchapter is responsible in whole or in part for causing the release or threatened release, there shall exist a lien against such property for the moneys expended by the state including, but not limited to, expenditures from the Emergency Response Fund.

If the expenditure results in an increase in the value of the property, the lien shall also be for the increase in value.

- (b) The lien shall be effective upon the filing of a notice of lien by the state or by the state agency which made the expenditure. This notice shall be filed with the circuit clerk in the county in which the land is located.
- (c) The lien obtained by this section shall not exceed the amount of expenditures as itemized on an affidavit of expenditures attached to and filed with the notice of lien and the increase in property value as a result of the response action taken as determined by an independent appraisal. A copy of the appraisal shall also be attached to and filed with the notice of lien.
- (d) The notice of lien shall be filed within thirty (30) days of the date of the last act performed on such property by the department or other affected state agency or its agent under this subchapter.
- (e) Upon filing of the notice of lien, a copy with attachments shall be served upon the property owner in the manner provided for enforcement of mechanics' or materialmen's liens.
- (f) Any and all moneys recovered by or reimbursed to the department pursuant to this section through voluntary agreements or court orders shall be deposited and credited to the account of the Emergency Response Fund.

8-7-418. Punitive damages.

If any person who is liable for a release or threatened release of a hazardous substance fails, without sufficient cause, to implement response action in accordance with representations made by the person to the department for the purposes of 8-7-408(c) or fails to properly provide response action upon order of the department, the person may be liable to the state for punitive damages in an amount equal to three (3) times the amount of any costs incurred by the state as a result of the failure to take proper action.

8-7-419. Appeals.

An appeal may be taken from any final order of the department issued under this subchapter as provided in 8-4-205, 8-4-212 - 8-4-214, and 8-4-218 - 8-4-229, and in accordance with regulations promulgated by the commission under this subchapter.

8-7-420. Liability for injuries, etc. - Exceptions.

- (a) A person taking response action under this subchapter as a contractor for the department shall not be liable under this subchapter or under any other state law to any person for injuries, costs, damages, expenses, or other liability, including, but not limited to, claims for indemnification or contribution and claims by third parties for death, personal injury, illness, loss of or damage to property, or economic loss resulting from a release or threatened release of hazardous substances.

- (b) However, the provisions of subsection (a) of this section shall not apply in case of a release that is caused by the conduct of the person taking response action which is negligent, grossly negligent, or which constitutes intentional misconduct.
- (c) A state employee or an employee of a political subdivision who provides services relating to response action while acting within the scope of his authority as a governmental employee shall have the same exemption from liability subject to the other provisions of this section as is provided to the contractor under subsections (a) and (b) of this section.
- (d)
 - (1) Nothing in subsections (a), (b), or (c) of this section shall affect the liability of any person under warranty under state or common law.
 - (2) Nothing in this subsection shall affect the liability of an employer taking response action to any employee of any such employer under any provision of law, including any provision of any law relating to workers' compensation.